

A Tee Siew Kai (as the liquidator for Kumpulan Kerjaya Bhd (the receiver and manager appointed)) (in liquidation) v Affin Bank (formerly known as BSN Commercial Bank (M) Bhd) & Anor

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS
NOS D-24 NCC-294 OF 2010 AND P-24 NCC-105 OF 2010
MOHAMAD ARIFF J
26 JANUARY 2011

C *Companies and Corporations — Winding up — Fraudulent preference — Whether debentures created by company to first defendant were fraudulent preference — Security documents and debentures dated within six months prior to commencement of winding up of company — Whether documents and debentures ‘made’ before six-month period commenced — Proceeds of sale of shares allotted to company after winding up subject to fixed charge under debentures — Application by liquidator to declare security documents and debentures void and obtain custody of share sale proceeds — Whether liquidator proved existence of all pre-conditions for s 293 of the Companies Act 1965 to be invoked — Whether company insolvent when debentures created — Whether security documents and debentures created in course of normal banking business*

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Two suits, prosecuted respectively by the liquidator and the receiver and manager of Kumpulan Kerjaya Bhd (‘KKB’) and raising common questions of law and fact were heard together by the court. The suit filed by the liquidator, the main suit, sought to invalidate two supplementary credit facility agreements between the first defendant and KKB and two debentures KKB had created in favour of the first defendant as security for facilities granted. The liquidator contended that the security documents and debentures were a ‘fraudulent preference’ for the first defendant over other creditors as they were created during the six months prior to the commencement of the winding up (the ‘twilight period’) of KKB and as such were void. By the same token the liquidator claimed it was entitled to custody of about RM3.3m in proceeds of sale of certain shares which were allotted to KKB after it was wound up, which were held in a stakeholder’s fixed deposit account. The receiver and manager, in its suit, sought declarations that the share sale proceeds were subject to either a valid fixed or floating charge under the debentures created in favour of the first defendant and that the receiver and manager was entitled to custody of the proceeds. One pair of the facility agreement and debenture was dated 21 October 1999 while the other was dated 28 October 1999. KKB subsequently defaulted under the facilities, the first defendant appointed the second defendant as receiver and manager under the debenture on 14 February 2000, a creditor’s winding up petition was presented against KKB on 17 April 2000 and KKB was wound up on 16 August 2000.

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The liquidator submitted that the facts of the case satisfied all the pre-conditions laid down under the law for s 293 of the Companies Act 1965 to be invoked to have the security documents and debentures declared void. The receiver and manager and the first defendant however argued that whilst the agreements and debentures in question were dated within the 'twilight period' they were 'made' the moment KKB signed and sealed those documents which was before the 'twilight period' had commenced. It was also argued that the agreements and debentures were created in the ordinary course of business between KKB and the first defendant and in response to a restructuring of initial facilities and were not created simply to give a preference. It was also submitted that there was no evidence to show KKB was insolvent when the debentures were created.

Held, dismissing the liquidator's claim and allowing prayers 1, 4, 5 and 6 of the receiver and manager's claim with taxed costs of both suits to be paid out of the assets of KKB:

- (1) There was sufficient evidence to prove the debentures were in fact executed by KKB before the commencement of the 'twilight period' although they bore a date which was within it. The court agreed that the debentures were actually 'made' before 17 October 1999 (see para 60).
- (2) The liquidator's stand was not correct in law or policy. s 293 of the Companies Act 19 read with s 53 of the Bankruptcy Act 1967 could not be construed in a mechanistic manner but read in its proper context to invalidate attempts at fraudulent preference. It should not be a mere matter of counting the dates and determining the 'twilight period' and indulging in legal semantics with an indifferent regard to commercial reality and banking practices (see para 59).
- (3) The purpose of the security documents should be considered, whether they were created or made in the course of a normal, genuine commercial transaction. If so, there could not be any issue of a 'fraudulent' preference. The restructuring of the facilities granted to KKB was a normal and genuine banking transaction which was beyond the scope of any fraudulent preference (see para 59).
- (4) The onus was on the liquidator to prove KKB was insolvent when the debentures were created. The test was one of commercial insolvency, namely the inability of the company to meet its current debts as and when due. A company which faced some financial difficulty and required a restructuring of its banking facilities was not necessarily insolvent. It was per se not proof of insolvency (see para 59).
- (5) The effect of the liquidator's arguments challenged the validity of the appointment of the receiver and manager under the debentures. The commercial consequences were major and reduced the security provided

- A to the bank to naught for it would then occupy the same position as other unsecured creditors despite having debentures created in its favour. The legal and policy arguments had to be strong and compelling to allow such an inroad into banking security documents (see para 59).
- B **[Bahasa Malaysia summary]**
Dua guaman yang telah didakwa masing-masingnya oleh penyeselai dan penerima dan pengurus Kumpulan Kerjaya Bhd ('KKB') dan menimbulkan persoalan-persoalan undang-undang dan fakta telah dibicarakan bersama oleh mahkamah. Guaman tersebut telah difailkan oleh penyeselai, guaman utama, C memohon untuk mentaksahkan dua perjanjian tambahan kemudahan kredit antara defendan pertama dan KKB dan dua debentur KKB telah dibuat bagi pihak defendan pertama sebagai cagaran untuk kemudahan yang diberikan. Penyeselai menegaskan bahawa dokumen-dokumen cagaran dan debentur adalah 'fraudulent preference' untuk defendan pertama ke atas pemiutang lain D kerana dibuat dalam tempoh enam bulan sebelum bermula penggulungan ('tempoh masa akhir') KKB dan oleh itu tidak sah. Dengan cara yang sama penyeselai mendakwa ia berhak mendapat lebih kurang RM3.3 juta hasil jualan saham tertentu yang telah diagihkan kepada KKM selepas ia digulungan, yang dipegang dalam akaun deposit tetap pemegang amanah. E Penerima dan pengurus, dalam guamannya, memohon deklarasi bahawa hasil jualan saham tertakluk kepada sama ada cagaran tetap atau terapung yang sah di bawah debentur yang dibuat bagi pihak defendan pertama dan bahawa penerima dan pengurus berhak mendapat hasil tersebut. Sepasang perjanjian kemudahan dan debentur bertarikh 21 Oktober 1999 manakala yang lain F bertarikh 28 Oktober 1999. Berikutan kegagalan KKB di bawah kemudahan itu, defendan pertama telah melantik defendan kedua sebagai penerima dan pengurus di bawah debentur pada 14 Februari 2000, petisyen penggulungan pemiutang telah dikemukakan terhadap KKB pada 17 April 2000 dan KKB telah digulung pada 16 Ogos 2000.
- G Penyeselai berhujah bahawa fakta kes memenuhi semua prasyarat yang dikehendai di bawah undang-undang untuk s 293 Akta Syarikat 1965 yang digunakan untuk menjadikan dokumen-dokumen cagaran dan debentur diisytiharkan sebagai tidak sah. Penerima dan pengurus dan defendan pertama H bagaimanapun berhujah bahawa meskipun perjanjian-perjanjian dan debentur-debentur yang dipersoalkan bertarikh dalam 'tempoh masa akhir' ia telah 'dibuat' pada saat KKB menandatangani dan memeteraikan dokumen-dokumen tersebut iaitu sebelum 'tempoh masa akhir' bermula. Adalah juga diujahkan bahawa perjanjian-perjanjian dan debentur-debentur I telah dibuat dalam pelaksanaan biasa perniagaan antara KKB dan defendan pertama dan sebagai tindak balas terhadap penstrukturan semula kemudahan pertama dan tidak dibuat semata-mata untuk memberi keutamaan. Adalah juga diujahkan bahawa tiada keterangan untuk membuktikan bahawa KKB tak solven apabila debentur-debentur tersebut dibuat.

Diputuskan, menolak tuntutan penyelesai dan membenarkan permohonan-permohonan 1, 4, 5 dan 6 kepada tuntutan penerima dan pengurus dengan kos cukai ke atas kedua-dua guaman yang dibayar daripada aset-aset KKB:

- (1) Keterangan mencukupi untuk membuktikan debentur-debentur pada hakikatnya telah disempurnakan oleh KKB sebelum 'tempoh masa akhir' bermula meskipun ia mempunyai tarikh yang menunjukkan tarikh dalam tempoh tersebut. Mahkamah bersetuju bahawa debentur-debentur sebenarnya telah 'dibuat' sebelum 17 Oktober 1999 (lihat perenggan 60).
- (2) Pendirian penyelesai tidak tepat dari segi undang-undang atau polisi. Seksyen 293 Akta Syarikat 1965 dibaca bersama s 53 Akta Kebankrapan 1967 tidak boleh ditaksirkan secara mekanikal tetapi dibaca dalam konteksnya yang betul untuk mentaksahkan cubaan keutamaan secara fraud. Ia bukan hanya perkara mengira tarikh dan menentukan 'tarikh masa akhir' dan menurut semantik perundangan dengan bersikap tidak ambil peduli tentang amalan realiti komersial dan perbankan (lihat perenggan 59).
- (3) Tujuan dokumen cagaran patut dipertimbangkan sama ada ia dibuat dalam transaksi komersial yang biasa dan sebenar. Jika begitu, tiada apa-apa isu tentang keutamaan secara fraud. Penstrukturan semula kemudahan yang diberikan kepada KKB adalah transaksi perbankan yang biasa dan sebenar yang melampaui skop apa-apa keutamaan secara fraud (lihat perenggan 59).
- (4) Beban terletak pada penyelesai untuk membuktikan KKB tak solven apabila debentur-debentur itu dibuat. Ujian berasaskan ketaksolvenan komersial, iaitu ketidakupayaan syarikat melangsaikan hutang semasanya pada dan apabila masa perlu dibayar. Syarikat yang berhadapan dengan masalah kewangan dan memerlukan penstrukturan semula kemudahan perbankan tidak semestinya tak solven. Ia bukan bukti per se ketaksolvenan (lihat perenggan 59).
- (5) Hujah-hujah penyelesai mencabar kesahan pelantikan penerima dan pengurus di bawah debentur-debentur. Akibat komersial adalah besar dan mengurangkan cagaran yang diberikan kepada bank menjadi sia-sia sahaja sama seperti kedudukan pemiutang tanpa cagaran yang lain meskipun mendapat debentur-debentur dibuat bagi pihaknya. Hujah-hujah perundangan dan polisi perlu kukuh dan mendorong untuk membenarkan dokumen-dokumen cagaran perbankan ditembusi (lihat perenggan 59).]

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A Notes:

For cases on adoption, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1069–1079.

Cases referred to

- B** *Affin Bank Bhd v Malayan Banking Bhd* [2009] 2 MLJ 74, CA (refd)
Air Services Australia v Ferrier and Another (1996) 137 ALR 609, HC (refd)
Arab Malaysian Merchant Bank Bhd v Orient Apparel Bhd & Ors [2002] 1 MLJ 89, HC (refd)
Bank Pembangunan & Infrastruktur Malaysia Berhad v Omar bin Haji Ahmad [2010] MLJU 387 (refd)
- C** *Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd & Anor* [1993] 1 MLJ 119, HC (refd)
Eric Holmes (Property) Ltd, Re [1965] 2 All ER 333 Ch D (refd)
Esberger & Sons Limited v Capital and Counties Bank [1913] 2 Ch 366 (refd)
- D** *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 44, SC (refd)
Patrick and Lyon, Ltd [1933] All ER Rep 590 (refd)
Saipem (M) Sdn Bhd & Anor v AG & P (M) Sdn Bhd (in liquidation) & Ors [1996] 1 MLJ 239, HC (refd)
- E** *Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd* [1998] 4 MLJ 569, FC (folld)
Spiral Globe Limited (No 2), The; In re The Watson v The Spiral Globe Limited [1902] 2 Ch 209 (refd)
Yorkshire Woolcombers' Association Limited, ReHouldworth v Yorkshire Woolcombers' Association Ltd, Re [1903] 2 Ch 284 (refd)
- F**

Legislation referred to

Bankruptcy Act 1967 ss 53, 53(1), 54, 54(1)
Companies Act 1965 ss 293, 293(1), 294, 294(1)
G Companies Act 1948 [UK] s 320(1)

SS Soo (Paul Ong & Associates) for the plaintiff in Originating Summons No D-24 NCC-294 of 2010.

Yoong Sin Min (Lee Weng Shinh with her) (Shook Lin & Bok) for the first defendant in Originating Summons No D-24 NCC-294 of 2010.

- H** *TH Goh (Karen Tee with him) (Azhar & Goh) for the second defendant in Originating Summons No D-24 NCC-294 of 2010.*

TH Goh (Karen Tee with him) (Azhar & Goh) for the plaintiff in Originating Summons No D-24 NCC-105 of 2010.

SS Soo (Paul Ong & Associates) for the defendants in Originating Summons No D-24 NCC-105 of 2010.

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Mohamad Ariff J:

INTRODUCTION

[1] There are two suits before this court which have been heard together since they raise common questions of law and fact. There are also common parties in that both the liquidator and the receiver and manager of the company concerned, namely Kumpulan Berjaya Bhd ('KKB'), are parties to the dispute. One of the parties, the Chargee bank (Affin Bank Bhd), is the named litigant in one of the suits; the Bank is not a party in Suit No D-22 NCC-105 of 2010. This latter suit is instituted between the receiver and manager against the liquidator of the company.

[2] By common consensus, the parties have agreed to have as the main Suit No D-22 NCC-294 of 2010, where the liquidator is the plaintiff and the receiver and manager and the bank are defendants.

[3] The immediate challenge posed by the liquidator concerns the proceeds from the sale of what has been identified as the Lion Land Bhd shares (TLB shares') amounting to RM3,307,334.07 which are currently held in a stakeholder's fixed deposit account. The dispute is on the right to have custody of these proceeds. The liquidator maintains, for reasons to be elaborated below, that it has the right to have custody over the shares and the proceeds arising from the sale. The receiver and manager, on the other hand, argues that the LLB shares and the proceeds resulting from the sale, are subject to either a valid fixed or floating charge, and as such the receiver and manager is the rightful party to have custody of the proceeds.

[4] In the suit instituted by the liquidator, however, the issues framed and argued are broader than this immediate question of the proceeds. The liquidator in Suit No D-22 NCC-294 of 2010 is questioning the validity of two supplemental agreements executed between that the bank and the company as borrower, as well as questioning the validity of two debentures created by the company as security for the bank in respect of the facilities granted.

[5] The legal complications, which have been fully argued before this court by counsel for all parties concerned, arise from the legal status of this company in liquidation and its effect on the banking documents and charges created in view of their alleged creation during the so-called 'twilight period'. This 'twilight period' refers to the six months prior to the commencement of the winding up of the company/borrower which is taken to be the date of presentation of the winding up petition, namely 17 April 2000. It is perhaps

A conducive to clarity to set out the relevant critical dates in the winding up proceedings. These dates are as follows:

B	1. Statutory notice under s 218 of the Companies Act presented by a creditor company (Terus Maju Industrial Hardware Sdn Bhd):	25 February 2000
	2. Winding up petition presented against KKB:	17 April 2000
	3. Winding up order made against the KKB:	16 August 2000
	4. Six months prior to commencement of winding up:	17 October 1999

C [6] There is no dispute on the law that the six months is to be calculated from the date the winding up petition is presented against the company, being the date of commencement of winding up proceedings.

D [7] The legal issues in the two disputes therefore revolve around the effects of the winding up proceedings on the facilities and security documents created within this so-called 'twilight period'. The relevant sections argued extensively before this court are ss 293 and 294 of the Companies Act 1965, read together with ss 53 and 54 of the Bankruptcy Act.

E THE ESSENCE OF THE DISPUTE

F [8] The kernel of this dispute relates to the important issue of 'fraudulent preference' in the liquidation process. This is the essential basis on which the liquidator is seeking to invalidate the relevant security documents and charges created (allegedly created during the twilight period) and by the same token is staking its claim to custody of the proceeds from the sale of the LLB shares.

G THE PRAYERS FOR RELIEF

[9] For ease of analysis and clarity, I set out below the numerous prayers for relief in the two suits.

Suit No D-22 NCC-294 of 2010

H [10] Suit by the liquidator for:

I (a) Declaration that the supplemental agreement dated 21 October 1999 and debenture dated 21 October 1999, supplemental agreement dated 28 October 1999 and debenture dated 28 October 1999 executed between BSN Commercial Bank and KKB (receiver and manager

appointed and under liquidation, are invalid and void under s 53 of the Bankruptcy Act read together with ss 293 and 294 of the Companies Act.

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- (b) Declaration that the plaintiff as the liquidator is entitled to the custody over RM3,307,334.07 and interest thereon in the fixed deposit account held by Messrs Azhar & Goh, the sum being the proceeds from the sale of 2,150,000 units of shares of Lion Land Bhd which was allotted to KKB.

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- (c) That the proceeds of sale amounting to RM3,397,334.07 and interest thereon in the said fixed deposit account be released to the plaintiff within 14 days of this court's order.

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- (d) That the first defendant (the R & M) disclose all accounts, records and/books pertaining to KKB to the plaintiff in keeping with ss 223 and 277 of the Companies Act within 14 days from the date of this court's order.

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- (e) That the first defendant release all monies and securities, charges, fixed and floating under the said agreements and debentures within the 14 days.

- (f) That the first defendant be at liberty to file proof of debt of all debts accrued and due from KKB.

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- (g) Costs of this application.

Suit No D-24 NCC-105 of 2010

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[11] Suit by the receiver and manager of KKB for:

- (a) Declaration that the sum of RM3,307,334.07 and accrued interest thereon in the fixed deposit account currently held by Messrs Azhar & Goh (the sale proceeds) being the sale proceeds from the sale of Lion Land Bhd's shares allotted to KKB under the debt restructuring exercise of the Lion Group of Companies, is subject to the fixed charges contained in the debenture of 21 October 1999 and supplemental debenture of 28 October 1991.

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- (b) Alternatively, a declaration that the sum of RM3,307,334.07 together with accrued interest thereon is subject to the floating charges contained in the said debentures.

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- (c) In the event the sale proceeds are subject to the floating charges contained in the debentures, a declaration that the floating charges are valid and not void under s 294 of the Companies Act, or alternatively, the floating charge contained in the supplemental debenture dated 28 October 1999 is valid to the extent of RM3,000,000 and interest payable thereon at the rate of 5% from 4 March 2000 or such other dates deems fit by this court.

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- A (d) A declaration that the plaintiff is entitled to the custody of the sale proceeds.
- (e) An order that Messrs Azhar & Goh do forthwith within 14 days release the sum and all accrued interest thereon to the plaintiff.
- B (f) That the defendant pay the costs of this application.

[12] In point of time, the latter suit was filed earlier by the receiver and manager. As indicated earlier, it had been ordered that both suits be heard together, in view of the overlapping and common questions of law and fact.

C The bank is not a party in the suit by the receiver and manager.

[13] I now proceed to consider the brief factual matrix of this case.

D BRIEF FACTUAL BACKGROUND

[14] At all material times, the company, KKB, was a customer of the first defendant bank (previously BSN, but arising from a merger, the assets and business of BSN has been vested in Affin Bank Bhd) in respect of several

E banking facilities which extended over a period from 28 August 1997 to 28 October 1999.

The banking facilities

F [15] They were, first and foremost, initial facilities granted amounting to RM 19,800,000 in 1997. These initial facilities were supported by two facility agreements dated 28 August 1997 and 25 September 1999. These initial facilities were subsequently restructured by a letter of offer dated 22 July 1999.

G They were restructured into 'permanent line' and 'project financing line' facilities in which a new term loan and a letter of credit/trust receipts facility were also granted. The restructured facilities comprise:

H	Permanent Line	Limit
	(i) Overdraft 1	RM 3,000,000
	(ii) Bank Guarantee	RM 5,000,000
	(iii) Letter of Credit/Trust Receipts	RM 1,000,000, within BG limit
	(iv) Term Loan 2	RM 3,000,000

I	Project Financing Line	
	(v) Term Loan 1	RM 3,000,000
	(vi) Bank Guarantee	RM 3,800,000
	(vii) Letter of Credit/Trust Receipts Facility	RM 2,000,000
	Grand Total	RM 19,800,000

[16] These restructured facilities under the July 1999 letter of offer were supported by a supplemental facility agreement dated 21 October 1999. A debenture dated the same date was also created as security for these restructured facilities, which the bank described as 'the first supplemental facilities'.

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[17] In September 1999, to be precise on 24 September 1999, the Bank granted a further facility in the form of an additional loan of RM3,000,000. This 'second supplemental facility' was supported by a second supplemental agreement dated 28 October 1999 and a supplemental debenture dated 28 October 1999.

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[18] It is evident on the facts that the first and second debentures were expressly intended by the parties to secure the first supplemental and the second supplemental facilities.

[19] KKB subsequently defaulted under the facilities, and the bank appointed the second defendant as the receiver and manager on 14 February 2000 pursuant to its powers under the debentures.

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[20] I pause here to highlight the fact that the first and second supplemental facility agreements and the debentures are all dated within the 'twilight period', which, as has already been noted, is 17 October 1999.

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[21] It needs also to be observed that the difference between the date when the twilight period begins and the creation of the two supplemental agreements and the two debentures is a mere matter of a few days.

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[22] KKB, as has also been noted earlier, was wound up on 16 August 2000. The plaintiff in Suit No D-22 NCC-294 of 2010 was appointed as liquidator of the company.

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The LLB shares and proceeds of sale therefrom

[23] As far as the proceeds from the sale of the LLB shares are concerned, they arise from a debt owing to KKB by a company called Lion Construction Engineering Sdn Bhd ('LCE') which was a subsidiary of the Lion Group of Companies. Arising from a restructuring scheme by LCE, the debt of LCE was settled by the allocation of shares in Lion Land Bhd to KKB. All in all 2,150,000 shares in Lion Land Bhd were allotted to KKB as part of this restructuring scheme. This allocation of shares was apparently allocated

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A sometime in 2002. It is unclear when the indebtedness arose between KKB and LCE, but according to the receiver and manager work was done by KKB for Jopp Builders Sdn Bhd (another subsidiary of the Lion Group of Companies) sometime in 1997. This was the debt shown in the books and records of KKB and in the statement of affairs filed by one of its directors.

B [24] Upon the plaintiff being appointed the liquidator of KKB, a dispute arose between the liquidator and the receiver and manager of the company on the question of who should be rightfully entitled to the custody of the LLB shares. This dispute arose because the liquidator was challenging the very
C validity of the two debentures. Both parties came to an agreement so as to ensure the issuance and allocation of the LLB shares to the company, and to allow the receiver and manager to hold the LLB shares as stakeholder. Further, it was also agreed between the parties that should the receiver and manager
D exercise the power of sale under the debenture or the supplemental debenture, the proceeds of the sale would be forwarded to the receiver and manager's solicitors to hold as stakeholder pending the determination by the court, or by agreement, on the issue of entitlement to the custody of the shares and the
E proceeds. The solicitors appointed to act as stakeholder in this connection is the legal firm of Messrs Azhar & Goh.

F [25] It has to be stressed for a better understanding of the legal issues that the liquidator is not challenging the validity of the initial facility agreements which were created in August and September 1997, namely on dates before the six months prior to the presentation of the winding up petition. Aside from these
F facility agreements, the liquidator is challenging the very validity of all the other supplemental facility agreements and debentures.

THE LEGAL BASIS OF CHALLENGE

G [26] The case for the liquidator rests essentially on his combined reading of s 293 of the Companies Act 1965 and s 53 of the Bankruptcy Act 1967. In the
H course of submission, another connected section of the Companies Act, namely s 294, also became relevant. Nevertheless, the liquidator's position was that whereas s 293 read in conjunction with s 53 applied to the facts of this case, s 294 did not. It is necessary to set out the full wording of these provisions so as to appreciate the respective positions of the parties in this dispute.

THE RELEVANT STATUTORY PROVISION

I [27] Section 293 of the Companies Act reads:

293 Undue preference —

- (1) Any transfer, mortgage, delivery of goods, payments, execution or other act relating to property made or done by or against a Company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall in the event of the Company been wound up be void or voidable in like manner.
- (2) For the purposes of this section a date which corresponds to the date of presentation of the bankruptcy petition in the case of an individual shall be —
 - (a) In the case of a winding up by the court —
 - (i) The date of the presentation of the petition; or
 - (ii) Where before the presentation of the petition a resolution has been passed by the company for voluntary winding up the date on which the resolution to wind up the Company voluntarily, is passed, whichever is earlier; and
 - (b) In the case of a voluntary winding up the date on which the winding up is deemed by this Act to have commenced.
- (3) Any transfer or assignment by a company of all its property to trustees of the benefit of all its creditors shall be void.

[28] Section 53 of the Bankruptcy Act 1967 reads as follows:

53 Avoidance of preference in certain cases —

- (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered any person unable to pay his debts, as they become due, from his own money in favour of any Creditor or any person in trust for any Creditor shall be deemed to have given such creditor a preference over other Creditors if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same and every such act shall be deemed fraudulent and void as against the official assignee.
- (2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a Creditor of the bankrupt.
- (3) For the purposes of this section 'creditor' includes a surety or Guarantor for the debt due to the Creditor.

[29] Section 294 of the Companies Act provides:

294 Effect of floating charge —

A floating charge on the undertaking or property of the company created within six months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid except

A to the amount of any cash paid to the company at the time of or subsequently to the creation of and in consideration for the charge together with interest on that amount at the rate of five per centum per annum.

B [30] It is evident from the wording of s 293 of the Companies Act that it imports the bankruptcy law on fraudulent preference into winding up law. Section 53 of the Bankruptcy Act is made to apply in effect mutatis mutandis. Technically, s 293 refers to 'undue' preference, whereas s 53 of the Bankruptcy Act clearly refers to 'fraudulent' preference. Despite the seemingly differing nomenclature, it is evident the purpose is to address what is deemed to be
C 'fraudulent' preference. It has to be noted that the very terms of s 293 of the Companies Act do not expressly refer to s 53 of the Bankruptcy Act, but merely allude to 'under the law of bankruptcy be void or voidable'

D [31] It must also be stressed at the outset that any proscribed act under s 53 is merely 'deemed' to be fraudulent and void as against the official assignee. The effect is to create a rebuttable presumption, and this has been recognised in the cases. See *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 44. The Federal Court in *Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd* [1998] 4 MLJ
E 569 has also laid down that the onus is on the liquidator to satisfy that all the requirements under s 293 are met. The *Sime Diamond* decision is referred to by all parties in this dispute, and in this light the parties have therefore a consensus on the basic requirements under the provision. The Federal Court held in this
F case:

We must now turn to consider s 293 of the Companies Act. The law relating to fraudulent preferences is set out in s 53 of the Bankruptcy Act, which is made applicable to companies by s 293 of the Companies Act, and is designed to preserve the sanctity of the pari passu principle by which creditors in the winding up share
G rateably in the assets available for distribution

We note, in passing, that in *Lian Keow Sdn Bhd & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 Seah SCJ, speaking in the Supreme Court, held that the rules of bankruptcy as to fraudulent preferences are applied to the
H winding up of Companies.

To take the matter further, it is clear law that the court has no power to make an order setting aside payments and transfers made in the run-up to bankruptcy in favour of a particular Creditor which were designed to prefer him over other
I creditors unless the following five conditions are satisfied:

- (1) That the transaction in question took place within six months prior to the commencement of winding up;
- (2) That it satisfies the description of one of the types of transaction mentioned in section 53(1) of Bankruptcy Act;

- (3) That it took place at a time when the Company was insolvent; A
- (4) That the person in whose favour the transaction was effected stood in the relation of Creditor to the Company; and
- (5) The effect of the transaction was to confer on the person a preference, priority or an advantage over other Creditors in the winding up. B

The onus was, of course upon the liquidator to satisfy *all* the five requirements aforesaid (see the judgment delivered by Edgar Joseph Jr FCJ at pp 578–579 of the report).

THE LIQUIDATOR'S CASE C

[32] It is the case for the liquidator that all five requirements in *Sime Diamond* have been satisfied on the facts of the case here. To quote the relevant written submission of counsel for the liquidator: D

Pursuant under s 53 of the Bankruptcy Act 1967 ... read together with s 293 of the Companies Act 1965, every conveyance or transfer of property, every charge, every payment made, every obligation incurred by virtue of the aforesaid Agreements and Debentures dated 21 October 1999 and 28 October 1999 between BSN and KKB are void as they were created within six months from the date of presentation of the winding up Petition. These Agreements and Debentures shall be deemed to have given the first defendant preference over other Creditors. E

[33] The position taken by the liquidator, by this argument, follows the literal words of the two inter-connected sections. It is therefore readily understandable why the prayers have been worded in the form mentioned earlier. The challenge is to the validity of the agreements and debentures dated 21 October 1999 and 28 October 1999. According to the liquidator, the five ingredients have been satisfied as follows: F

- (a) The relevant facilities agreements and debentures were created within the six months from the date of presentation of the winding up. G
- (b) These agreements and debentures created fixed and floating charges on KKB's assets, and hence satisfied the description of one of the types of transaction mentioned in s 53(1) of the Bankruptcy Act. I take this argument to be grounded on the words 'charge thereon made' which appears in s 53(1). H
- (c) These agreements and debentures were created at a time when the company was insolvent, since they were created at the request of KKB to renew, revise and restructure the two loans amounting to RM 19,800,000, and as such it was evidently clear that when these agreements and debentures were created, KKB was already in default of I

- A the existing loans. In other words, KKB was insolvent at the time of the creation of the agreements and debentures.
- (d) The charges were effected in favour of the bank, and therefore the existence of the creditor relationship was established.
- B (e) 'Needless to say' (according to the liquidator) the effect of the creation of the debentures had conferred on the bank a preference, priority or advantage over the other creditors and winding up petition.
- C [34] The analysis and the conclusion reached that all five ingredients have been satisfied seems to me mechanistic in approach, and if this court were to accept the liquidator's argument on the law as applied to the facts, the obvious logical conclusion must be that even the appointment of the receiver and manager must be held invalid, since the appointment is made pursuant to the debentures now being sought to be invalidated. This, however, is not the case
- D as pleaded, for the liquidator does not appear to be directly challenging the validity of the appointment of the receiver and manager.
- E [35] The liquidator cites, by way of illustration, the English Chancery Division case of *Re Eric Holmes (Property) Ltd* [1965] 2 All ER 333 and that part of the judgment reading:
- F ... Where a creditor making an advance takes from the debtor a promise to execute the charge at the request of the creditor, the court will, in the absence of any other circumstances, readily infer that the purpose of the parties — ie the debtor as well as the creditor — was to give the creditor the right to be preferred on request. such an arrangement, although for value, is fraudulent and unenforceable, and when the debtor in performance of its promise in fact creates a charge at the request of the creditor, the court again, in the absence of any other circumstances, will readily infer that the intention of the debtor is to prefer the creditor ...
- G [36] This passage is illustrative, but I find it does not seem to fully support the liquidator's position. The Chancery Court in the above passage stressed that the creation of the charge at the request of the creditor might lead the court to 'readily infer' that the purpose of the parties was to give the creditor a preference which was fraudulent and unenforceable. It qualified this principle by equally stressing that this ready inference would be made 'in the absence of any other circumstances'. The Chancery Court, to my mind, was applying a flexible approach to the issue. The facts of the case, when analysed, are equally important to note to appreciate the principle that is established. The creditor in
- H *Re Eric Holmes* was a shareholder of the company who provided it finance to acquire a piece of land and to erect buildings thereon. He took an undertaking from the company's solicitors to hold the deeds to the property to his order and an undertaking that the company execute a formal mortgage on demand. The company subsequently became unable to pay its debts as they became due, and
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hence was insolvent. A meeting was held between the shareholder/creditor and two directors of the company, at which meeting that creditor asked that the undertakings given should be implemented by giving him formal charges. The Chancery Court held the dominant intention of the company in making the two charges and mortgage was to perform the company's promise under its undertakings, and hence the charges and mortgage was made with a view to give the shareholder/creditor a preference over the other creditors of the company and to that extent was fraudulent and void under the English s 320(1) of the Companies Act.

[37] The Chancery Court stressed as well the question of what was 'the dominant intention'.

[38] Counsel for the bank, Ms SS Soo, also cites another Chancery Division decision of *Re Patrick and Lyon, Ltd* [1933] All ER Rep 590, where the court defined the words 'defraud' and 'fraudulent purpose' as denoting actual dishonesty, involving, according to current notions of fair trading among commercial men, real moral blame. This case is also authority for the proposition, seen earlier, that the onus to establish this fraudulent purpose lies on whoever seeks to challenge the legality of the relevant security documents. On the facts of this case, it was a debenture that was being challenged, as it turned out unsuccessfully. One other case which was advanced in argument, namely *Saipem (M) Sdn Bhd & Anor v AG & P (M) Sdn Bhd (in liquidation) & Ors* [1996] 1 MLJ 239, is also a case where on the facts the arrangement entered into by the relevant parties showed the dominant intention to be to create a fraudulent preference. On the facts of this case, a settlement agreement was entered into between Saipem (M), Saipem Italy and the first defendant, by which Saipem (M) agreed to take over the obligations of the first defendant in exchange for it obtaining the benefits under a settlement agreement. A certain sum of money was placed in an interest-bearing account in the joint names of the solicitors acting for the first plaintiff and the first defendant. The money was to be used for paying debts owing to certain identified creditors of the first defendant. Any remainder was agreed to be held on 'trust' for Saipem (M). Saipem (M) was subsequently wound up. Since the settlement agreement was created within six months from the presentation of the winding up petition, the High Court held the settlement agreement to be void as against the provisional liquidator. The company was evidently insolvent when the settlement agreement was entered into.

[39] All three cases, it has to be noted, are not cases dealing with banking facilities as part of a bank's normal course of banking business. I will return to this point later.

A THE RESPONSES OF THE RECEIVER AND MANAGER AND THE BANK

B [40] In the course of submission, counsel for the receiver and manager, Mr TH Goh and counsel for the bank, Ms SM Yoong, basically took a common position, arguing that the liquidator had not satisfied all five ingredients established in *Sime Diamond*. Although accepting the twilight period commenced on 17 October 1999, it was argued that the bank granted the initial facilities (ie the first and second facilities) long before the six-month period prior to the presentation of a winding up petition. The subsequent facilities agreements and debentures were in respect of a restructured facility. To quote the written submission of counsel for the bank:

D KKB had requested for and the 1st Defendant had granted the first and second facilities long before the six-month period prior to the presentation of a Winding Up Petition on 17.4.2000. The said facilities were granted before 17.10.1999. See:

- E (i) The July LO dated 22.7.1999, which was issued by the 1st Defendant in respect of the First Facilities, and accepted by KKB on 31.7.1999 ...; and
- (ii) The September LO dated 24.9.1999, issued by the 1st Defendant in respect of the Second Facility, and accepted by KKB on 28.9.1999

...

F The material cut-off date here is 17.10.1999, which would be six months prior to the presentation of winding up Petition on 17.4.2000. The agreement to grant the said facilities under the letters of offer therefore arose long before 17.10.1999

When the charges were 'made'

G [41] Counsel for the bank, Ms Yoong Sin Min, also advanced a thought-provoking argument in relation to the issue of when the debentures were 'made'. The word 'made' of course appears expressly in s 53(1) of the Bankruptcy Act, with its reference to '[e] very conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered ...'

I [42] It was argued that the liquidator had failed to prove that the debentures were made by KKB within the twilight period. The liquidator merely relied on the dates of the debentures. According to counsel, the first and second adventures had been created/made the moment KKB signed and sealed this documents with its company seal which was done on a date before 17 October 1999, and therefore these two debentures were not caught within the twilight period. The evidence disclosed that the first debenture had been executed by KKB before 13 August 1999, whereas the second debenture has been so

executed either on or before 16 October 1999 which was a Saturday. The cut-off date for the twilight period is 17 October 1999 which was a Sunday. This particular argument was stated thus:

The Second Supplemental Agreement and the Second Debenture were also executed by KKB on the date before 17.10.1999, for a new facility of RM 3,000,000.

Undisputed evidence of this is seen from the letter from the 1st Defendant's solicitors dated 18.10.1999, where the relevant loan/security documents which were already executed by KKB in relation to the Second Facilities, were delivered to the 1st Defendant. As 18.10.1999 was a Monday, KKB would have executed the relevant documents before 17.10.1999, a Sunday.

[43] I must say there is force in this argument. It will be the height of technicality for this court to ignore the evidence and merely rely on the mere dates on the face of the debentures. And this court will be ill-advised to ignore applicable equitable principles which accept the creation of an equitable charge in defined circumstances. See *Bank Pembangunan & Infrastruktur Malaysia Berhad v Omar bin Haji Ahmad* [2010] MLJU 387 (cited in argument) for a case where the court applied equitable principles to avoid invalidating a charge. See also the English case of *Esberger & Sons Limited v Capital and Counties Bank* [1913] 2 Ch 366, which concerns a charge which was not dated and registered. The Bank was held to have a good and complete equitable title, since a deed takes effect from its delivery and not from its date. See further the case of *In re The Spiral Globe Limited (No 2); Watson v The Spiral Globe Limited* [1902] 2 Ch 209, for the proposition that a charge is created when the seal of the company is affixed, and not when it is registered.

Quite apart from the above argument on whether the debentures were made or created before the twilight period, the main thrust of the bank's case rested on the argument that the debentures created did not fall within the type of transaction contemplated by s 53(1) of the Bankruptcy Act, as incorporated by s 293(1) of the Companies Act.

WHETHER NORMAL BANKING FACILITIES WITHIN CATEGORY OF FRAUDULENT PREFERENCE

[44] In addressing this issue, the bank relates it to the fifth requirement stated in *Sime Diamond*, namely whether the debentures conferred a preference, priority or advantage over the other creditors. The High Court of Australia decision in *Air Services Australia v Ferrier and Another* 137 ALR 609 is cited for the proposition that the purpose of the debtor in making a payment has 'evidentiary significance'. The High Court of Australia held:

A If payment is part of a wider transaction or a 'running account' between the debtor and the creditor, the purpose for which the payment was made and received will usually determine whether the payment has the effect of giving the creditor preference, priority or advantage over other creditors.

B [45] This court was also referred to our own High Court decision in *Arab Malaysian Merchant Bank Bhd v Orient Apparel Bhd & Ors* [2002] 1 MLJ 89, which adopts the reasoning in *Air Services Australia*. It was strongly urged upon this court that this present case fell squarely on all fours with the *Orient Apparel* decision. James Foong J (as His Lordship then was) stated in that case:

C Arising from the security documents were some of the dispositions considered by this court earlier. Once again, for the purpose of determining whether these was undue preference under s 293 of the Act read with s 53(1) of the BA, the five conditions set out earlier... must be satisfied. To reiterate, this court is of the view that at the material time when these instruments were created, OAB was not insolvent. OAB, as discussed earlier, was facing liquidity problems and not insolvent within the concept, as laid down in *Sandell v Porter*. As for the undue preference factor, from facts presented, I find no trace of mala fide on the part of the bank to secure these instruments other than to assist OAB to have an opportunity to regain its business strength. The creation of these instruments was part of this exercise as well as of a wider transaction that began way back in 1995. For the facilities to be made available, it was not uncharacteristic of the bank to obtain securities. This was in accordance with normal ordinary banking practices. I am not convinced that these were carried out to give undue preference to the bank.

F [46] In this connection, Miss Young submitted:

G When KKB needed to have its initial facilities restructured, the 1st Defendant did so and granted new facilities in return for the creation of the First Debenture. Shortly thereafter, when KKB needed new funds of RM3,000,000 (the Second Facility which comprised Letters of Credit/Trust Receipts Facilities), the 1st Defendant granted the same to assist KKB, and the Second Debenture was committed to secure others. All these took place in the ordinary course of business between the 1st Defendant and KKB. There was no evidence produced by the liquidator to show that the facilities and the debentures were created to give preference to the first Defendant.

I [47] The short point made was it was a normal banking practice for a bank to ask for security upon providing financial assistance to its customers. See also *Bensa Sdn Bhd (in liquidation) v Malayan Banking Bhd & Anor* [1993] 1 MLJ 119, and the reference to a 'normal straightforward commercial dealing as is practised in the usual course of such business ...' *Bensa* was a case where the liquidator of the company applied for an order that the bank return money placed in a fixed deposit account since it was not a secured debt and must therefore be returned for distribution among the general creditors. The FD had

been created as collateral for the issue of a performance bond by the second respondent, an insurance company. The FD was placed with the bank. The High Court held:

The transaction that took place between the company and the insurance company is to my mind a normal straightforward commercial dealing as is practised in the usual course of such business. The creation of the FD collateral cannot be said to have in the absence of any evidence to the contrary, an intention of the parties at the material time to confer a preferential priority or advantage over other creditors. In any event, as stated earlier, the transaction took place six months before the winding up petition was presented thus annulling the presumption of such an intention. (At p 126 of the report)

THE SUBSIDIARY ARGUMENTS

[48] Aside from the grounds discussed above, the bank and the receiver and manager also attempted to support the validity of the challenged agreements and debentures on the following basis:

- (a) Section 293 of the Companies Act, to be operative, requires that the liquidator establish KKB was insolvent at the time the charges were created.
- (b) Section 54 of the Bankruptcy Act is also applicable, with its reference to protection of bona fide transactions without notice.
- (c) In regard to the proceeds from the sale of the LLB shares, s 294 of the Companies Act operates to protect the validity of the charge of the shares on the alternative ground that the charge created is a floating charge.

[49] On the issue of insolvency, this, as has been seen earlier above, constitutes one of the ingredients laid down in *Sime Diamond*. The onus lies on the liquidator to establish this, but the liquidator of KKB has provided no evidence to establish KKB was insolvent when the debentures were created. The liquidator rests his case on the mere argument that KKB was unable to pay its debt because it was in default of the banking facilities which in turn required the facilities to be restructured

[50] The argument on s 54 of the Bankruptcy Act rests on sub-s (1) of that section which reads in its material parts:

54 Protection of bona fide transactions without notice.

(1) Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate in the case of a bankruptcy —

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(c) Any conveyance or assignment by the bankrupt for valuable consideration;

B (d) Any contract, dealing or transaction by or with the bankrupt for valuable consideration:

if —

C (i) The payment, delivery, conveyance, assignment, contract, dealing or transaction, as the case may be, takes place before the date of the receiving order, and

D (ii) The person... to, by or with whom the payment, delivery, conveyance, assignment, contract, dealing or transaction was made, executed or entered into has not, at the time of the payment, delivery, conveyance, assignment, contract, dealing or transaction, notice of any available act to bankruptcy committed by the bank before that time.

E [51] It is argued s 54 of the Bankruptcy Act is likewise incorporated in winding up law pursuant to s 293 of the Companies Act with its broad wording reading ‘... would in his bankruptcy *under the law of bankruptcy* be void or voidable shall in the event of the company been wound up be void or voidable in like manner’. (Emphasis added.)

F [52] As regards s 294 of the Companies Act, this point was particularly stressed by counsel for the receiver and manager. Nevertheless, this remains an alternative argument which is advanced to ensure the validity of the debentures on the charge on the shares and the proceeds thereof to the amount of RM3,000,000 together with interest at the rate of 5%pa. This effect flows from the wording of s 294 which reads:

G A floating charge on the undertaking or property of the company created within six months of the commencement of a winding up shall, unless it is proved that the Company immediately after the creation of the charge was solvent, be invalid except to the amount of any cash paid to the Company at the time of on subsequently to the creation of and in consideration for the charge together with interest on the amount at the rate of 5 per centum per annum.

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I [53] Whether the charge created is a fixed or floating charge is a matter of contractual intent, although the nomenclature used by the parties may not be necessarily conclusive. Romer LJ’s classic passage in *Re Yorkshire Woolcombers’ Association Limited*, *Houldworth v Yorkshire Woolcombers’ Association Ltd* [1903] 2 Ch 284, as adopted by our Court of Appeal in *Affin Bank Bhd v Malayan Banking Bhd* [2009] 2 MLJ 74 is cited in explanation of the ingredients of a floating charge:

... a floating charge is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until something occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp ...

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... a specific charge is one that without more fastens on ascertained and definite property capable of being ascertained and defined ...

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[54] By the very express terms of the debentures, the charge in relation to the shares is a fixed charge. Clause 5.01 of the first debenture, for example, includes as a first fixed charge, a charge 'over all stocks, shares, bonds and securities of any kind whatsoever ...' and 'over all book and other debts revenues and claims both present and future ...' The 'first floating charge, on the other hand, is defined as a charge 'over the whole of the undertaking of the borrower and all and singular its properties and assets (other than those hereinbefore referred to in (a) and (d) above ...including its stock in trade'. These clause are repeated in the second debenture.

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[55] I also take note of the common cl 7.01 of the debentures which places limitations on transactions by the company of its book debts, which have to be paid into the borrower's account with the Bank and may only be withdrawn upon written authorisation of the bank.

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[56] On the facts, the charge in respect of the shares and therefore the proceeds thereof, is in law therefore subject to a fixed charge. Consequently, I do not find it immediately relevant to consider and apply s 294 of the Companies Act.

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[57] As for the relevance of s 54 of the Bankruptcy Act, I have considered it but find it difficult to regard it as incorporated by virtue of s 293 of the Companies Act, since the former section speaks of bona fide transaction without notice of an 'act of bankruptcy'. There is no equivalent of an 'act of bankruptcy' in winding up proceedings.

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[58] I am therefore excluding s 294 of the Companies Act and s 54 of the Bankruptcy Act as determining issues in my evaluation and conclusion below.

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EVALUATION AND CONCLUSION

[59] There are evidently competing claims by the liquidator on the one hand and the receiver and manager on the other, with the chargee bank placed in the

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- A middle of this dispute. The claim advanced by the liquidator, if allowed, will result in the invalidity of the critical facility agreements and the debentures. Although the liquidator does not pretend to challenge the first two facility agreements, these agreements are not the ones that matter since the first facilities have been restructured and reflected in the subsequent supplemental agreements and the debentures. As this court has observed earlier (and this observation was made known to the parties), the effect of the liquidator's argument is to challenge the very validity of the appointment of the receiver and manager since he is appointed pursuant to the powers conferred in the two debentures. The commercial consequences can only be major, and will reduce the security provided to the bank to naught, for it will then occupy the same position as other unsecured creditors, despite having debentures created in its favour. The legal and policy arguments must be strong and compelling to allow such an inroad into banking security documents. I am not persuaded that the liquidator's stand is correct in law or policy, or for that matter has plausible commercial justification. Section 293 of the Companies Act read in conjunction with s 53 of the Bankruptcy Act, to my mind, cannot be construed in a mechanistic manner, but must be read in its proper context, which is to invalidate attempts at 'fraudulent preference'. It should not be a mere matter of counting the dates and determining the 'twilight period', and indulge in mere legal semantics with an indifferent regard to commercial reality and banking practices. It surely cannot be good law for a legal conclusion to be made dependent on the vagaries of dates merely. On the facts of this dispute, had the supplemental agreements and the debentures been dated a few days earlier, they would as a simple matter of arithmetic be outside the 'twilight period'. It is therefore necessary to consider the broader basis, as cases such as *Air Services Australia*, *Orient Apparel* and *Bensa* have done, and consider the purpose of the security documents. The answer must surely lie with the question whether these have been created or made in the course of a normal, genuine commercial transaction. If so, there cannot be any issue of a fraudulent preference. Section 293 merely creates a rebuttable presumption of fraudulent preference where a charge, for example, is made within the six months from the date of presentation of the winding up petition, and it bears reiteration that all five necessary ingredients as established in *Sime Diamond* must be satisfied. With due respect, I do not believe the liquidator has succeeded in doing so. The onus is on the liquidator to prove KKB was insolvent when the debentures were created. The test is one of commercial insolvency, namely the ability of the company to meet its current debts as and when due. A company which faces some financial difficulty and requires a restructuring of its banking facilities need not necessarily be regarded as insolvent. It is per se not proof of insolvency. If it should be regarded so, and given the presumption of fraudulent preference, it might dissuade banking and financial institutions to offer financial help to companies in financial distress, or worse still, disincline these institutions from

restructuring facilities already offered when such restructuring could be providing a much-needed lifeline to these companies. The restructuring of the facilities granted to KKB should properly be regarded as a normal and genuine banking transaction which is beyond the scope of any 'fraudulent preference'. There does not appear to be any plausible evidence or reason to suggest otherwise.

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[60] In any event, there is sufficient evidence to prove the debentures were in fact executed by KKB before the commencement of the 'twilight period', although bearing a date which is within it. I agree with the bank's argument that these debentures were actually 'made' before 17 October 1999. I do not believe it right to ignore the realities of conveyancing practice, where security documents are sometimes formally dated somewhat later than their actual execution dates, but instead insist on arithmetical certainty.

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[61] Bearing in mind the facts and the governing law as elaborated in the several cases alluded to above, I do not find the case for the liquidator established, and as such I am dismissing the liquidator's claim in Suit No D-22 NCC-294 of 2010 with costs to be taxed, and allowing the claim by the receiver and manager in Suit No D-24 NCC-105 of 2010 in terms of the following prayers in the originating summons:

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- (1) A declaration that the sum of RM3,307,334.07 and accrued interest thereon in the fixed deposit account currently held by Messrs Azhar & Goh (the sale proceeds) being the sale proceeds from the sale of Lion Land Berhad's shares allotted to KKB under the debt restructuring exercise of the Lion Group of Companies, is subject to the fixed charges contained in the debenture of 21 October 1999 and supplemental debenture of 28 October 1999
- (2) A declaration that the plaintiff is entitled to the custody of the sale proceeds.
- (3) An order that Messrs Azhar & Goh do forthwith within 14 days release the sum and all accrued interest thereon to the plaintiff.
- (4) That the defendant pays the taxed costs of this application.

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[62] As for costs, although it was advanced in argument by counsel for the bank and the receiver and manager, I do not believe it will be fair to order that the liquidator be made to bear the taxed costs of the suits personally. The duties cast on a liquidator are onerous and the liquidator here has come to court to

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A have the legal issues determined properly in accordance with law, and he cannot be penalised for this. He should in fairness be entitled to have the taxed costs be paid out of the assets of the company.

B *Liquidator's claim dismissed and prayers 1, 4, 5 and 6 of the receiver and manager's claim allowed with taxed costs of both suits to be paid out of the assets of KKB.*

Reported by Ashok Kumar

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